PERAK INTEGRATED NETWORK SERVICES SDN BHD v. URBAN DOMAIN SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
IDRUS HARUN JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-2442-11-2013]
21 MARCH 2016

COMPANY LAW: *Derivative action – Action on behalf of company – Whether proper mode to institute action – Whether there was absence of requisite elements for derivative action – Whether aggrieved party a minority shareholder – Whether majority or minority shareholder a conclusive test – Whether 'wrongdoer' control determines derivative action – Parties in equal shareholding position with equal voting power – Whether one party proved to be in de facto control of company – Whether action wrongly constituted – Whether court has jurisdiction to hear action*

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The appellant was granted a licence to provide network facilities to telecommunication providers by the Malaysian Communications and Multimedia Commission. Subsequently, a concession agreement was entered into by the appellant and the Government of the State of Perak appointing the appellant as the sole concessionaire to undertake works in the said State. Pursuant to the licence, the appellant entered into a license agreement with Group A Operators whereby the appellant agreed to construct telecommunication towers at its own costs and rent it to the Group A Operators for a fixed period of time. Subsequently, the appellant and the first respondent entered into an arrangement by way of a shareholders agreement whereby a separate entity, the second respondent, was created. Pursuant to the said agreement, the first respondent became a 50% shareholder of the second respondent while the appellant was the other 50% shareholder. The third defendant was a 90% indirect shareholder of the appellant by virtue of the fact that he owned 90% of the company that owned the appellant. Thus, by the management agreement entered into between the appellant, the second respondent, PINS Capital Sdn Bhd and the first respondent, it was agreed that the appellant would award the entire construction work of the infrastructures to the second respondent and would appoint the second respondent as the exclusive management company to manage, lease and receive rental and to

carry out the maintenance of the infrastructures. Besides the Group A Operators, there were also other telecommunication providers involved namely Group B Operators which entered into an agreement with the appellant. However, the appellant's position was that the said Group B Operators did not form part of the second respondent's scope of works and entitlement and the second respondent was estopped from claiming any entitlement to the proceeds from the Group B Operators. The first respondent thus commenced the present action alleging that in breach, of *inter alia,* the award letter and management agreement, the appellant and third defendant had engaged in wrongful acts resulting in the first and second respondent suffering loss and damages. The first respondent therefore claimed, on its own behalf and on behalf of the second respondent, various declarations including, *inter alia,* that the appellant and third defendant were liable to account to the second respondent for all fees payable under the management agreement. The High Court, in entering judgment in favour of the second respondent, held that the second respondent was entitled to the revenues of the Group B Operators as well and that the appellant was in breach of the management agreement when it ceased payment to the second respondent for the revenues from the Group B Operators. Hence, the appellant appealed against the said decision. The issues that arose for determination, *inter alia,* were (i) whether the first respondent's claim was flawed as a derivative action was not the proper mode to institute the action; and (ii) whether the court had jurisdiction to hear the first respondent's derivative action as it was allegedly not a true derivative action.

Held (dismissing appeal)

Per Idrus Harun JCA delivering the judgment of the court:

(1) The first respondent commenced the present action by way of a derivative action on behalf of the second respondent. In outlining the reasons for commencing the suit by derivative action, the statement of claims stated that the alleged wrongdoer namely the third defendant was a director of the other alleged wrongdoer namely the appellant whilst the victim was the second respondent. Further, since the alleged wrongdoer, namely the appellant, and the second respondent were the only two shareholders of the second respondent, there was a deadlock in the body of members and no resolution could possibly be passed to enable any member to remove a director who was a nominee of the other member or appoint an additional director of its choice. (paras 12 & 13)

(2) Being a majority or minority shareholder is not a conclusive test. A derivative action lies if the first respondent is not in *de facto* control. The question whether the aggrieved party is a minority shareholder is not so much of legal relevance, rather it is the 'wrongdoer' control that determines derivative action. Where a company with a 50-50 control faces a deadlock situation, as was with the second respondent in this appeal, any attempt by an aggrieved party to procure the company to

take action against the wrongdoer who was in control of the company in a negative sense, would also be in vain in a similar way a minority shareholder would face in like situation as the wrongdoer could stifle any suggestion of an action by the company against it. (paras 25 & 26)

(3) The 'wrongdoer' control clearly arose in this case where the aggrieved first respondent and the wrongdoers, namely, the appellant and the third defendant were in 50-50 control such that either could prevent the second respondent from suing. The wrongdoer in the whole ongoing saga was the appellant and the third defendant who were indeed in control of the second respondent in the negative sense that they could prevent the second respondent from taking action against them. The victim in the whole episode was clearly the respondents. The second respondent was being disabled from taking action against the appellant. This prevailing situation had driven the first respondent to commence this suit by way of a derivative action. (paras 39 & 40)

(4) Derivative action is a procedural convenience for enabling the court to do justice and for the benefit of a company which is controlled by miscreant director and shareholder and persons associated to them. There was overwhelming evidence that would show that, despite the appellant and the first respondent being in equal shareholding position with equal voting power scenario, the appellant was in *de facto* control of the second respondent that would in effect not have been possible for the first respondent to set the second respondent in motion to bring the action. The action was not wrongly constituted. The first respondent was correct in pursuing its claim against the appellant by way of derivative action. This court clearly had jurisdiction to hear the action. (para 48)

Bahasa Malaysia *Headnotes*

Perayu diberikan lesen untuk menyediakan kemudahan rangkaian kepada penyedia telekomunikasi oleh Suruhanjaya Komunikasi dan Multimedia Malaysia. Seterusnya, satu perjanjian konsesi dimeterai oleh perayu dan Kerajaan Negeri Perak melantik perayu sebagai syarikat konsesi tunggal bagi melaksanakan kerja-kerja dalam negeri tersebut. Menurut lesen tersebut, perayu memasuki satu perjanjian perlesenan dengan Pengendali Kumpulan A di mana perayu bersetuju untuk membina menara telekomunikasi dengan kos sendiri dan menyewakannya kepada Pengendali Kumpulan A untuk satu tempoh masa yang tetap. Kemudian, perayu dan responden pertama memasuki satu pengaturan melalui perjanjian pemegang saham di mana satu entiti berasingan, responden kedua, diwujudkan. Menurut perjanjian tersebut, responden pertama memegang 50% saham untuk responden kedua dan perayu pula memegang baki 50%. Defendan ketiga adalah pemegang 90% saham perayu secara tidak langsung kerana dia memiliki 90% daripada syarikat yang memiliki perayu. Dengan itu, melalui perjanjian pengurusan

yang dimasuki antara perayu, responden kedua, PINS Capital Sdn Bhd dan responden pertama, dipersetujui bahawa perayu akan mengawardkan kerja-kerja pembinaan keseluruhan infrastruktur kepada responden kedua dan akan melantik responden kedua sebagai syarikat pengurusan eksklusif untuk mengurus, memajak dan menerima sewa serta menjalankan penyelenggaraan infrastruktur. Selain Pengendali Kumpulan A, terdapat penyedia telekomunikasi lain melibatkan Pengendali Kumpulan B yang memasuki satu perjanjian dengan perayu. Walau bagaimanapun, kedudukan perayu adalah bahawa Pengendali Kumpulan B tidak menjadi sebahagian daripada skop dan hak responden kedua dan responden kedua dilarang daripada menuntut apa-apa hak ke atas hasil daripada Pengendali Kumpulan B. Responden pertama memulakan tindakan ini dengan menghujahkan bahawa dalam melanggar, antara lain, surat award dan perjanjian pengurusan, perayu dan defendan ketiga terlibat dalam perbuatan salah yang mengakibatkan responden pertama dan kedua mengalami kerugian. Justeru, responden pertama menuntut bagi pihaknya dan pihak responden kedua beberapa deklarasi termasuk, antara lain, bahawa perayu dan defendan ketiga bertanggungjawab untuk menjelaskan kepada responden kedua semua bayaran yang kena dibayar di bawah perjanjian pengurusan. Mahkamah Tinggi, dalam memasukkan penghakiman memihak kepada responden kedua, memutuskan bahawa responden kedua berhak kepada hasil Pengendali Kumpulan B dan juga bahawa perayu telah melanggar perjanjian pengurusan apabila ia tidak lagi membuat pembayaran kepada responden kedua bagi pendapatan daripada Pengendali Kumpulan B. Oleh itu, perayu merayu terhadap keputusan tersebut. Isu-isu yang berbangkit untuk pertimbangan, antara lain adalah (i) sama ada tuntutan responden pertama cacat kerana tindakan terbitan bukan mod yang sesuai untuk memulakan tindakan ini; dan (ii) sama ada mahkamah mempunyai bidang kuasa untuk mendengar tindakan terbitan responden pertama.

Diputuskan (menolak rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Responden pertama memulakan tindakan ini melalui tindakan terbitan bagi pihak responden kedua. Dalam merangka alasan-alasan untuk memulakan tindakan melalui tindakan terbitan, penyata tuntutan menyatakan bahawa pesalah iaitu defendan ketiga sebagai pengarah pesalah yang lagi satu, iaitu perayu, dan mangsa adalah responden kedua. Selanjutnya, oleh kerana hanya pesalah, iaitu perayu, dan responden kedua adalah pemegang saham responden kedua, terdapat kebuntuan dalam keahlian dan tiada residusi yang boleh diluluskan untuk membolehkan seseorang ahli membuang mana-mana pengarah yang merupakan penama ahli yang lain atau melantik pengarah tambahan pilihannya.

(2) Menjadi pemegang saham majoriti atau minoriti bukanlah ujian muktamad. Tindakan terbitan terletak jika responden pertama tidak mempunyai tindakan *de facto*. Persoalan sama ada pihak yang terkilan adalah pemegang saham minoriti tidaklah begitu berkaitan dengan undang-undang relevan, sebaliknya ia adalah kawalan 'pesalah' yang menentukan tindakan terbitan. Di mana syarikat mempunyai kawalan 50-50 menghadapi kebuntuan, seperti responden kedua dalam rayuan ini, sebarang cubaan oleh pihak yang terkilan untuk mendapatkan syarikat mengambil tindakan terhadap pesalah yang mengawal syarikat secara negatif, juga akan menjadi sia-sia dengan cara yang sama seorang pemegang saham minoriti akan menghadapi dalam situasi yang sama kerana pesalah boleh menyekat apa-apa cadangan tindakan oleh syarikat terhadapnya.

(3) Kawalan 'pesalah' dengan jelasnya timbul dalam kes ini di mana responden pertama yang terkilan dan pesalah iaitu perayu dan defendan ketiga dalam kawalan 50-50 di mana salah satu boleh menghalang responden kedua daripada mengambil tindakan guaman. Pesalah dalam saga berterusan ini adalah perayu dan defendan ketiga yang mempunyai kawalan ke atas responden kedua secara negatif dan boleh menghalang responden kedua daripada mengambil tindakan terhadap mereka. Mangsa dalam episod ini dengan jelasnya adalah responden-responden. Responden kedua dilumpuhkan daripada mengambil tindakan terhadap perayu. Keadaan ini mendorong responden pertama untuk memulakan guaman ini melalui tindakan terbitan.

(4) Tindakan terbitan adalah satu kemudahan prosedur bagi membolehkan mahkamah melakukan keadilan dan untuk manfaat satu syarikat yang dikawal oleh pengarah yang tidak amanah dan pemegang saham serta pihak-pihak yang berkaitan dengan mereka. Terdapat keterangan kukuh yang menunjukkan, walaupun perayu dan responden pertama berada dalam kedudukan pemilikan saham yang sama dengan kuasa mengundi yang sama, perayu mempunyai kawalan *de facto* ke atas responden kedua dan akan menjadikannya mustahil untuk responden pertama menggerakkan responden kedua membawa tindakan guaman. Tindakan ini tidak salah dilaksanakan. Responden pertama betul dalam meneruskan tuntutannya terhadap perayu melalui tindakan terbitan. Mahkamah ini jelas mempunyai bidang kuasa untuk mendengar tindakan ini.

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Anglo-Eastern (1985) Limited & Anor v. Karl Nutz & Ors [1988] 1 HKLR 322 ***(refd)***

Barrett v. Duckett [1995] 1 BCLC 243 ***(dist)***

Burland v. Earle [1902] AC 83 ***(refd)***

Fargro Ltd v. Godfroy [1986] BCLC 370 ***(refd)***

Ferguson v. Wallbridge [1935] 3 DLR 66 ***(refd)***
Foss v. Harbottle (1843) 67 ER 189 ***(refd)***
Liu Hsiao Cheng v. Wong Shu Wai [2015] 4 HKLRD 766 ***(refd)***
Nurcombe v. Nurcombe [1984] BCLC 55 ***(refd)***
Ting Chong Maa v. Chor Sek Choon [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(i)

For the appellant - Gopal Sri Ram, RK Sharma, Adam Kiob, Phang Zheng Jack & David Yii; M/s Vicknaraj, RD Ratnam Rajesh Kumar & Assocs
For the respondents - Bastian Vendargon, Leong Kwong Wah, S Ravenesan & Vincent Lim Seng Liang; M/s Dennis Nik & Wong

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 22NCC-1041-07-2012 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

Preliminaries

[1] This appeal is related to Civil Appeal No: 02(NCC)(W)-2434-11-2013 (the second appeal). At the commencement of the hearing of this appeal on 5 November 2015, learned counsel for the appellant informed us that firstly, he would argue on this appeal first and that if we were with the appellant, the second appeal would be rendered academic and secondly the parties to this appeal agreed to confine their submissions at this stage on the issue of derivative action only.

[2] This is an appeal from a decision of the High Court on 26 September 2013 after a full trial wherein the first respondent's claim against the appellant was allowed with costs. The appellant was the second defendant in the High Court whilst the first respondent was the plaintiff.

[3] It is also noteworthy that the claim by the first respondent against Dato' Seri Dr Abdullah Fadzil Che Wan (the third defendant) in the suit before the court of first instance was dismissed with costs. The second appeal is the first respondent's appeal against the said decision.

Summary Of Material Facts

[4] The appellant was granted a licence on or about 11 July 2005 to provide network facilities to telecommunication providers by the Malaysian Communications and Multimedia Commission. Subsequently a concession agreement was entered into by the appellant and the Government of the State of Perak on 10 July 2007, appointing the appellant as the sole concessionaire to undertake works in the State of Perak under the licence. Pursuant to the

licence, the appellant entered into a licence agreement on 1 June 2006, with Maxis, Digi and Celcom also known as the Group A Operators whereby the appellant agreed to construct telecommunication towers at its own costs and rent it to the Group A Operators for a fixed period of time.

[5] Subsequently, the appellant and the first respondent entered into an arrangement by way of a shareholders agreement dated 21 May 2007 whereby a separate entity, which was the second respondent, was created. Pursuant to the said agreement, the first respondent becomes a 50% shareholder of the second respondent while the appellant is the only other 50% shareholder. The third defendant is a 90% indirect shareholder of the appellant by virtue of the fact that he owns 90% of Perak Communication Technology Sdn Bhd which in turn wholly owns the appellant. Hence, the third defendant is also a 45% indirect shareholder of the second respondent. However, he is not a party to this appeal. Thus, by the management agreement dated 21 May 2007 entered into between the appellant, the second respondent, PINS Capital Sdn Bhd and the first respondent, it was agreed that the appellant should award the entire construction work of the infrastructures to the second respondent and should appoint the second respondent as the exclusive management company to manage, lease and receive rental and to carry out the maintenance of the infrastructures. It was also agreed that in the event that the appellant was awarded construction project by other telecommunication providers for the construction of infrastructures, it should also award the said construction work to the second respondent.

[6] As events turned out, besides the Group A Operators, there were also other telecommunication providers involved namely Group B Operators which entered into an agreement with the appellant. By virtue of cl. 4.1 of the management agreement and the first supplemental management agreement dated 27 May 2007, the appellant is liable to pay to the second respondent the maintenance fees calculated at the rate of 20% from the rental proceeds and other payments received from the operators. There were 87 towers constructed and maintained by the second respondent. However, the appellant's position is that the other operators that are the Group B Operators do not form part of the second respondent's scope of works and entitlement and the second respondent is estopped from claiming any entitlement to the proceeds from the Group B Operators. The appellant therefore disputed the second respondent's entitlement to any sums which the appellant received from the Group B Operators. This was evident by the fact that on 3 May 2011 the appellant sent a letter to the second respondent wherein it was categorically stated that the latter was not entitled to maintenance fee from the Group B Operators' revenues and that the former would take step to recover such fees previously paid to the second respondent. The dispute culminated in the appellant assuming control of the second respondent in March 2011 when it took over all the books and accounts of the second respondent.

[7] Following these events, and locked in the dispute, the first respondent commenced the present action alleging that in breach of the award letter and management agreement and the first supplemental management agreement, the appellant and third defendant had engaged in wrongful acts when they *inter alia*:

a) failed to pay to the second respondent the fees payable under the management agreement for services rendered to the appellant and all proceeds collected by the appellant;

b) failed to treat the award letter and management agreement as binding between the parties;

c) failed to award the entire construction work of the infrastructures and other infrastructures and the maintenance services to the second respondent;

d) procured the third defendant to issue on behalf of the appellant the letter dated 25 April 2011 to the second respondent to query the fees payable by the appellant to the second respondent;

e) procured the solicitor firm to issue the letter dated 7 April 2011 to the appellant to provide legal justification for the wrongful acts of the appellant; and

f) excluded Dr Haji Ahmad Kamal bin Zakaria (PW1) from the management and operations of the second respondent and kept the books, from the view, inspection or scrutiny of PW1 and representatives of the first respondent.

[8] The plaintiff had further alleged a breach of fiduciary duties owed by the third defendant to the second respondent being a director thereof.

[9] In consequence, the first respondent and the second respondent had suffered loss and damage. The first respondent wherefore claims on its own behalf and on behalf of the second respondent various declarations including *inter alia* that the appellant and third defendant are liable to account to the second respondent for all fees payable under the management agreement, all proceeds received by the appellant and that the third defendant had acted in breach of his fiduciary duties to the second respondent.

The High Court's Decision

[10] The learned High Court Judge on 26 September 2013 entered judgment in favour of the second respondent. Her Ladyship *inter alia* held that the second respondent was entitled to the revenues of the Group B Operators as well and the appellant was in breach of the management agreement when it ceased payment to the second respondent for the revenues from the Group B Operators after 3 May 2011. The learned judge further held that in accordance with cl. 4.1 of the management agreement dated

21 May 2007 and cl. 3.1 of the first supplemental agreement, the appellant was liable to pay to the second respondent the maintenance fee calculated at the rate of 20% from the rental proceeds and other payments received from the Group A Operators and the Group B Operators for the 87 towers which were constructed and maintained by the second respondent for the period from 21 May 2007 until the expiry of the period as stated in cl. 8.1.1 of the management agreement for the Group A Operators and Group B Operators. The learned judge further held that the maintenance fee payable by the appellant to the second respondent would be determined *vide* an account and inquiry to be conducted before the Registrar of the High Court.

The Appeal

[11] The grounds of the appellant's appeal are in regard to the above findings of the learned judge. However the sole issue for our determination at this stage of the appeal is whether the suit before the High Court is a properly constituted derivative action.

Decision

[12] It became clear from the writ of summons and the statement of claim that the first respondent commenced the present action by way of a derivative action on behalf of the second respondent. In outlining the reasons for commencing the suit by derivative action, the statement of claim states that the alleged wrongdoer namely the third defendant was a director of the other alleged wrongdoer namely the appellant whilst the victim was the second respondent. The other director of the second respondent was PW1. As there were only two directors, there was a deadlock in the Board of Directors of the second respondent and no resolution could possibly be passed to enable the second respondent to bring an action against the third defendant and the appellant.

[13] Further, since the alleged wrongdoer, namely the appellant, and the second respondent were the only two shareholders of the second respondent, there was also a deadlock in the body of members and no resolution could possibly be passed to enable any member to remove a director who was a nominee of the other member or appoint an additional director of its choice. Additionally, since the alleged wrongdoer, namely the third defendant was a direct shareholder of the other alleged wrongdoer, that is, the appellant, as well as an indirect shareholder of the victim that is the second respondent (in addition to being a director of both), the third defendant was in a position of conflict of interests. However, the third defendant did not remove himself from this position of serious conflict of interest but instead acted in conflict for the benefit of the appellant and himself to the detriment of the first and second respondents.

[14] Learned counsel for the appellant submitted that the issue whether derivative action was properly constituted or otherwise was a live issue. This reasoning, we assume, was advanced because this issue was in fact the subject of an earlier application to strike out the writ of summons and statement of claim brought on 31 July 2012 by the appellant before the High Court. The application was however dismissed by the High Court.

[15] The appellant appealed to this court against the High Court's decision but the said appeal was subsequently discontinued. It is an important point to mention that the appellant had also failed to ventilate this issue and no evidence was adduced thereon by the appellant at the trial of this action in the court below. The failure to do so and the withdrawal of the appeal before this court had prompted learned counsel for the respondent to submit that such action was consistent with an abandonment of the issue. Now, before us, learned counsel for the appellant submitted that the question of derivative action is a real or live issue so that if the suit is not a proper derivative action in law, the court does not have jurisdiction or should have declined jurisdiction to hear it and this jurisdictional issue can be raised at anytime. The appellant, we should say, had obviously sought to raise an issue which had already been determined by the High Court at the striking out stage and subsequently abandoned at the trial. However, this subject that was canvassed before us for determination was allowed to be raised following our decision on 14 May 2015 giving leave to the appellant to amend the memorandum of appeal to include the issue of derivative action as one of its grounds of appeal since we thought at the stage of hearing the application that the issue of jurisdiction would go to the root of this appeal.

[16] The gravamen of the appellant's complaint is its argument that the first respondent's claim is totally flawed as a derivative action is not the proper mode to institute the action due to the absence of requisite elements of a derivative action. That being the case, the appellant said, the learned judge erred in law in failing to hold that the court had no jurisdiction to hear the first respondent's derivative action as it is not a true derivative action. It is not one such action for the reason that the suit was brought by an equal shareholder and since there was no oppression by a majority shareholder, the learned judge ought to have dismissed it in the first instance. Both shareholders of the second respondent are equal shareholders. A derivative action is an equitable remedy based on the exception to the rule in *Foss v. Harbottle* (1843) 67 ER 189 which allows the minority shareholders to seek remedy on behalf of the company for wrongdoings done by the majority shareholders who are in control of the company.

[17] For a derivative action to be brought under the exceptions to the *Foss v. Harbottle* rule, learned counsel argued, the first respondent should at least prove that a wrong had been done to the second respondent, the first respondent was a minority shareholder of the second respondent or was not

in control of the second respondent and the wrongdoer was a person in control of the decision making of the second respondent. However, if the wrongdoers are themselves in control of the decision making of the company and since ordinarily majority shareholders of a company are in control of the decision making of the company, they should not be allowed to bring a derivative action on behalf of themselves as the remedy is only available to minority shareholders. Therefore the exception to the rule in *Foss v. Harbottle* that the true and proper plaintiff should be the company, should not apply to the present action. In support of this submission, learned counsel for the appellant referred to the relevant excerpts in the case of *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 which we reproduce below:

> We now turn to consider the one exception with which this case in concerned. It is the derivative action; an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for the reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company.

[18] The first respondent should also show that these minorities must not have alternative remedies available to them as can be seen in the judgment of the case of *Barrett v. Duckett* [1995] 1 BCLC 243 whereby Peter Gibson LJ quoted the judgment of Lord Blanesburgh in the case of *Ferguson v. Wallbridge* [1935] 3 DLR 66 which is shown below:

> But even in the case of a going company a minority shareholder is not entitled to proceed in a representative action if he is unable to show when challenged that he has exhausted every effort to secure the joinder of the company as plaintiff and has failed.

[19] Furthermore, since a derivative action is an equitable remedy, the person seeking remedy must come to court with clean hands (*Nurcombe v. Nurcombe* [1984] BCLC 557).

[20] However, the first respondent who brought the derivative action in the High Court, as learned counsel for the appellant put it, did not fulfil the above requirements. The reasons are these:

a) the first respondent is not a minority shareholder;

b) the first respondent who was the alter ego of PW1 was in charge of the second respondent and a director of the second respondent;

c) there were other remedies available; and

d) PW1, the first respondent's alter ego was the cause of the second respondent's current predicament.

[21] At this stage, we digress a little from our deliberation on the submission of learned counsel for the appellant to deal with a letter which we received from the appellant's firm of solicitors dated 25 November 2015 while this judgment was in the midst of being written seeking further submission on the issue of derivative action. It becomes apparent, according to the letter, that a recent decision by the High Court of Hong Kong in the case of *Liu Hsiao Cheng v. Wong Shu Wai* [2015] 4 HKLRD 766 is contrary to the position the appellant had taken in its submission before us. The appellant therefore graciously accepts the position in law that favours the first respondent. Following this request, we allowed the parties to submit written submissions. The appellant, in its further submission conceded that its submission at the hearing was a wrong proposition of law. It is now the appellant's submission that the common law derivative action can be brought in a case of a 50-50 deadlock. However, on the fact of the present case, since the first respondent which was in control, it was they who were the wrongdoers and not the victim namely the appellant. Therefore, as authors of the wrongdoers, the first respondent is precluded from bringing a common law derivative action. Being a procedural invention of equity, the first respondent must come to court with clean hands.

[22] It is thus clear that, based on the appellant's further submission, the requirement that the first respondent must prove that it is a minority shareholder of the second respondent is no longer in contention. However, since the appellant's submissions had dealt extensively with the requisite elements of a derivative action, we propose to take this issue together with the other issues raised in the submissions of both counsel for the appellant and the respondents.

[23] We would start off by stating the undisputed facts first. This suit is brought by the first respondent on behalf of the second respondent. This fact is undoubtedly described with sufficient clarity in the entitulement to the action. The first respondent, being the shareholder of the second respondent, is suing on behalf of the second respondent, by way of a derivative action against the appellant, the only other shareholder of the second respondent. Both shareholders have equal shareholding in the second respondent. Clearly, on the facts before us, the first respondent is not a minority shareholder of the second respondent.

[24] Even though the Court of Appeal in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors, supra* had stated that a minority shareholder could bring an action on behalf of himself and all other shareholders of the company, other than the defendants, it did not hold that the remedy was only available to minority shareholders. We would interpose here that, even though we accept that the first respondent is not, factually and in truth a minority, and there is no minority in the deadlocked second respondent, the wrongdoer control could also occur where there was a 50-50 control situation so that the aggrieved party namely the first respondent

could be prevented from bringing an action in the name of the second respondent if it could be shown that the other shareholder namely the appellant had committed the wrongful acts and was in control of the company. In *Anglo-Eastern (1985) Limited & Anor v. Karl Nutz & Ors* [1988] 1 HKLR 322, where the fourth defendant was beneficially owned 50% by the first defendant namely Karl Nutz and 50% by the second defendant and in the course of the 'good arguable case' submissions, counsel for the appellants had advanced the proposition that the action was wrongly constituted, it could not be a derivative action and it failed *in limine*. Silke, VP delivering the judgment of the Court of Appeal held that while strictly speaking there were no minorities in a deadlocked company, "we can see no good reason why the procedure employed here should not be countenanced by this court. The action does not fall *in limine*."

[25] The above decision, which we fully endorse herein, clearly makes sense because where a company with a 50-50 control faces a deadlock situation, as is with the second respondent in this appeal, any attempt by an aggrieved party to procure the company to take action against the wrongdoer who is in control of the company in negative sense, would also be in vain in a similar way a minority shareholder would face in a like situation as the wrongdoer could stifle any suggestion of an action by the company against it. In fact, in *Liu Hsiao Cheng v. Wong Shu Wai, supra* it was held that there was no legal requirement that in a deadlock situation, the aggrieved member to try to procure the company to take action against the wrongdoer as any such act would be futile. In that case, the plaintiff and the defendant were in 50-50 control of Golden Driven Investments Ltd, and the Hong Kong High Court held that:

> … although strictly there are no minorities in a deadlock company, there is no good reason why a CLDA cannot be brought in such a case. In such circumstances, the shareholder who has committed the wrongful act is in control of the company in the negative sense that he can prevent the company from taking action (see *Glass v. Atkin* [1968] 1 OR 90-93]. As Briggs J observed in *Universal Project Management Services Ltd. v. Fort Gilkicker Ltd.* [2013] Ch 551, [18] and [54], "wrongdoer control" will arise where the aggrieved members and wrongdoers are in 50/50 control, such that either may prevent the company from suing.
>
> … there is no legal requirement that in a deadlock situation, the aggrieved member is required to try to procure the company to take action against the wrongdoer. Such an act would be futile.

[26] Being a majority or minority shareholder is not a conclusive test. A derivative action lies if the first respondent is not in *de facto* control. We would refer to the case of *Ting Chong Maa v. Chor Sek Choon* [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572; [1989] 1 MLJ 477 which recognised that the second exception to *Foss v. Harbottle* required that the alleged wrongdoer be in control before a derivative action could be proceeded with on behalf of the company (see also *Burland v. Earle* [1902] AC 83). The question whether

the aggrieved party is a minority shareholder is not so much of legal relevance, rather it is the 'wrongdoer control' in our view that determines derivative action. The proper plaintiff rule in *Foss v. Harbottle, supra* as we understand it, has three exceptions. When a claim falls within one of these exceptions, a shareholder of a company can sue in his own name for the benefit of the company. The three exceptions are acts which, in effect, cannot be ratified by the majority shareholders at a general meeting (*Ting Chong Maa v. Chor Sek Choon, supra*). The exceptions are:

a) any act which is *ultra vires* the company;

b) any act which is a fraud on the minority, and that the alleged wrongdoers control the company; and

c) an act, which can only be effective, if resolved by a special resolution which is more than by a simple majority (*Ting Chong Maa v. Chor Sek Choon, supra; Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors, supra*).

The decisions in *Anglo-Eastern (1985) Limited & Anor v. Karl Nutz & Ors, supra* and *Liu Hsiao Cheng v. Wong Shu Wai, supra* have now expanded the scope of the second exception in *Foss v. Harbottle, supra* so that the requirement of 'wrongdoer control' can be satisfied where the aggrieved member and the alleged wrongdoer are in 50-50 control such that either may prevent the company from suing. In the case before us, the first respondent sought to manifest evidence of 'wrongdoer control' of the second respondent that had prevented the second respondent from suing. It would therefore be desirable for this court to consider the evidence in order to determine whether such situation existed.

[27] The evidence available according to learned counsel for the appellant, showed that it was PW1 who was in *de facto* control of the second respondent. During the trial before the High Court, the appellant led evidence to show that PW1 held meetings for the second respondent, had been present at most of its meetings and given instructions. Cross-examination of PW1 also showed that accounts of the appellant and the second respondent were handled by Tele-Flow Corporation Sdn. Bhd. of which PW1 was the director, that he was responsible for the accounts of both companies and one Azrina Mohd. Aziz who worked for Tele-Flow Corporation (Tele-Flow) reported to him. Clause 7.3 of the shareholders agreement provides that the Chief Executive Officer of the second respondent is to be nominated by the first respondent. The statutory declaration dated 6 November 2008 on the second respondent's financial statements was signed by PW1. He also signed the management agreement for the first and second respondents.

[28] For the appellant, it was contended that the above evidence clearly established that the second respondent was controlled by PW1 who was the alter ego of the first respondent. Learned counsel really drove home the point

that on the contrary, the appellant was not in *de facto* control of the second respondent. Therefore, if there was a breach of contract, or in order to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. The decisions in *Burland v. Earle, supra* and *Foss v. Harbottle, supra* were cited in support of this proposition.

[29] In effect, learned counsel sought to convince this court that the appellant's earlier application to strike out the first respondent's claim ought to have been allowed. It was not allowed though. An appeal against the decision was filed by the appellant but was subsequently withdrawn. At the full trial of the suit, the issue was not ventilated at all and the appellant did not make any application for the court to decline jurisdiction to hear the action. However, before us, learned counsel drew our attention to the fact that the learned trial judge did not make any finding that the appellant was in control of the second respondent. But, a pertinent point that we would like to mention is that in the High Court and in opposition to the appellant's application to strike out the claim on the same ground, the first respondent's case was that the appellant and the third defendant were the ones who were in control of the second respondent. By withdrawing its appeal, the appellant is now estopped from contending that the first respondent is in control of the second respondent. The matter should therefore admit of no further argument as the appellant has clearly chosen to no longer pursue the issue. It would, in our view, be scandalous for the appellant to now submit that the first respondent's claim ought to be dismissed in the first instance. It is true that there was no finding by the learned trial judge during the full trial of the case that the appellant was in full control of the second respondent. Equally true however, as learned counsel for the first respondent had correctly asserted, there was no submission on the issue of derivative action during the trial of the suit either. Thus, in our judgment, no such finding was ever made and neither the subject of derivative action was considered nor dealt with by the learned trial judge as it was beyond any question that the matter was not the issue during the trial. By withdrawing the appeal, the appellant cannot now contend that the first respondent did not meet the requirements set out in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors, supra*. The issue is no longer in question. The decision of the High Court in effect means that the suit is accepted as a properly constituted derivative action and such decision should remain valid.

[30] Notwithstanding the above conclusion, the uncontroverted fact is that there was a deadlock in the board room. The second respondent is undisputedly a joint venture company with equal shareholding between the appellant and the first respondent. The shareholders agreement provides for only two directors namely PW1 and the third defendant nominated by the first respondent and the appellant respectively. The third defendant was the

Chairman of the second respondent under the shareholders agreement. It was undoubtedly a deadlock scenario. The learned judge correctly noted the first respondent's contention that the appellant, the third defendant, DW1 (Zadey who is the third defendant's son) and Iwan (the third defendant's nephew) were in control of the second respondent since March 2011 when the appellant took over all the books and accounts of the second respondent. PW1's witness statement testified to this effect (see Question and Answer 61). A significant point to note is that PW1's evidence on this issue was completely unchallenged during cross-examination. As we have stated very early in this judgment, evidence was led to show that on 3 May 2011 the appellant had sent a letter to the second respondent notifying the latter that it was not entitled to maintenance fee from the Group B Operators' revenues and that the former would seek to recover such fees previously paid to the second respondent. This letter was signed by none other than the third defendant himself.

[31] The learned judge, accordingly, in para. 39 of her grounds of judgment found that the appellant was in breach of the management agreement when it ceased payment to the second respondent for the revenue from the Group B Operators after 3 May 2011. The revenue from Group A Operators alone, the learned judge found, was not sufficient to cover the second respondent's operating expenses to maintain the 87 towers.

[32] The learned trial judge had also correctly stated that the appellant and the third defendant had deprived the second respondent of funds to sustain operations as of 3 May 2011 resulting in the first respondent being unable to maintain the 87 towers. The appellant subsequently without notice or without issuing a letter of termination of the management agreement proceeded to take over the functions of the second respondent to perform the construction services, maintenance services and OSC services under the management agreement. This was admitted by DW1 during cross-examination.

[33] It is necessary to mention at this point that under cl. 6.1 of the management agreement, rental proceeds and other payments from the operators were paid directly to PINS Capital Sdn Bhd and according to the first supplemental management agreement, both the appellant and the first respondent agreed that the second respondent was entitled to deduct an amount equivalent to 20% of the rental proceeds and other payments as the maintenance fee for the maintenance of the infrastructures carried out by the second respondent.

[34] Learned counsel for the appellant highlighted to us that Tele-Flow controlled the appellant's account and that Azrina Mohd Aziz who worked for Tele-Flow reported to PW1. Notwithstanding this evidence however, PW1's evidence during re-examination, showed that subsequent to year 2009

he had not been provided with the accounts of the second respondent. In this regard, Tele-Flow was the company to whom the accounting functions of the second respondent, the appellant and PINS Capital Sdn Bhd were outsourced. DW1 admitted that the arrangement with Tele-Flow and the appellant as well as the second respondent was outside the management agreement. Subsequently, in 2010, the same accounting functions were outsourced to Real Time Management Outsourcing Services Sdn Bhd (Real Time) instead. Thus, Tele-Flow ceased to be responsible for the accounts of the appellant the second respondent and PINS Capital Sdn Bhd. The evidence of Jamilah Khamis (DW2) who worked for Real Time showed that she reported to DW1 and Iwan, not to PW1.

[35] The above overwhelming evidence in our judgment, has put paid to the appellant's contention that it was PW1 who was in *de facto* control of the second respondent and had caused its current predicament. The takeover of control of the second respondent had effectively and completely shut out the first respondent from maintaining or continuing its involvement in the management of the second respondent. There was therefore a deadlock situation which arose following the control of the second respondent by the wrongdoer namely the appellant and the third defendant that had completely prevented the Board of Directors from performing its functions. The dispute undoubtedly boiled down to the issue of revenue due to the second respondent. With the second respondent completely under the control of the wrongdoer, PW1 or the first respondent could not be said to be controlling the purse string and in control of the second respondent.

[36] It was contended that the party seeking remedy namely the first respondent must come to court with clean hands. The appellant claimed that PW1 was the alter ego of the first respondent. He was alleged to have siphoned out building sites to a company known as Bunga Raya ICT Sdn Bhd in which PW1 had vested interest, abused his powers and in breach of his fiduciary duties by using information beneficial to the business of the appellant to siphon out contracts to the company.

[37] It is to be noted that the allegations of abuse of power, breach of fiduciary duties and that PW1 is the alter ego of the first respondent are not pleaded in the appellant's defence and counterclaim and amended defence and counterclaim to this action. The appellant is clearly relying on the evidence in the winding up petition proceedings which was commenced after the judgment in this action when it raised this issue. It would be more appropriate if these allegations are pleaded in the present suit, in particular in relation to the issue of derivative action so as to enable the first respondent to reply and adduce rebuttal evidence during the trial.

[38] In any event, the appellant relied on the case of *Nurcombe v. Nurcombe, supra* in support of its contention on this issue. We would note that in that case, there was inequitable conduct on the part of the plaintiff shareholder

who had already been awarded a lump sum by the matrimonial court which took into consideration the improper profit made by the husband in the company. In the instant case before us however, the first respondent, not PW1, is the shareholder of the second respondent. It is a body corporate separate and distinct from PW1 and thus should not be affected for his alleged actions. *Nurcombe v. Nurcombe, supra* is in our view, of no assistance to the appellant.

[39] The 'wrongdoer control' clearly arose in this case where the aggrieved first respondent and the wrongdoers namely the appellant and the third defendant were in 50-50 control such that either could prevent the second respondent from suing. However, having considered the evidence adumbrated above we are convinced that the wrongdoer in the whole ongoing saga was the appellant and the third defendant who were indeed in control of the second respondent in the negative sense that they could prevent the second respondent from taking action against them. The victim in the whole episode was clearly the respondents.

[40] Contrary to the appellant's contention, the above evidence, in our opinion, is strong *indicia* of a firm and *de facto* control that the appellant had on the second respondent. With the second respondent in a deadlock situation, we cannot help but say that the second respondent was being disabled from taking action against the appellant. It is little wonder that this prevailing situation had driven the first respondent to commence this suit by way of a derivative action. The crux of the action is undeniably the dispute over the maintenance fee derived from rental proceeds and other payments from the Group A and Group B Operators which DW2 had agreed during cross-examination were channelled elsewhere instead of being paid to the second respondent. PW1 on the other hand insisted that the second respondent was entitled to the maintenance fee from both the Group A and Group B Operators but disputed by the appellant as regards the maintenance fee from the Group B Operators. Hence, if the second respondent was denied revenue from the Group B Operators, its 20% of revenue would decline. That is the crux of the respondents' claim against the appellant.

[41] We cannot accede to the argument urged for the appellant that PW1 was in *de facto* control of the second respondent and that this suit is not a derivative action, hence the court should decline jurisdiction. We now refer to the following passage at p. 250 of *Barrett v. Duckett, supra* which reads:

> Although Mrs Barret is not a minority shareholder but a person holding the same number of shares as the other shareholder, Christopher, in the circumstances of this case she can be treated as being under the same disability as a minority shareholder in that as a practical matter it would not have been possible for her to set the company in motion to bring the action.

[42] In the appeal before us, it would not have been possible for the first respondent to set the second respondent in motion to bring the action against the appellant and the third defendant. As stated earlier there was a deadlock in the Board of Directors as well as in the body of members of the second respondent and a loss of substratum of the second respondent had occurred. Furthermore, the third defendant is the controlling shareholder of the appellant and he had signed the appellant's letter dated 3 May 2011 which was sent to the second respondent for the purpose which we have alluded to earlier in our judgment.

[43] Based on the facts and the law, there is not the slightest room for doubt that this suit is a properly mounted derivative action. The first respondent, despite holding the same number of shares as the appellant, in the circumstances of this case, can be treated as being under the same disability as a minority shareholder as it would not have been possible for the first respondent to set the second respondent which was deadlocked in motion to bring this action.

[44] Learned counsel for the appellant drew our attention to the fact that there was a remedy available in the winding up court. Since the Board of Directors and the body of members of the second respondent were deadlocked and PW1 was a direct shareholder of the first respondent, it was submitted that the alleged claim by the first respondent could have been taken up in the winding up court and the first respondent was not entitled to bring the common law derivative action. Evidence supporting it can be seen when the first respondent filed a winding up petition on 27 January 2014 to wind up the second respondent under s. 218(1)(i) of the Companies Act 1965 based on the just and equitable rule after judgment had been given against the appellant for the second respondent on 26 September 2013.

[45] In the course of his submission, learned counsel emphasised that the deadlock occurred in 2011 but the winding up petition was only filed on 27 January 2014 whereby three years had lapsed. Citing *Barrett v. Duckett supra* and *Ferguson v. Wallbridge, supra*, learned counsel further submitted that the attempt to wind up the second respondent and the present action were clearly tainted with *mala fide*. With respect, we disagree. These cases are of no assistance to the appellant in advancing this argument on this point. In *Barrett v. Duckett, supra*, Barrett was not pursuing the action *bona fide* in the interest of the company but was pursuing it for personal reasons associated with the divorce of her daughter from Duckett. In the present appeal, the appellant had never alleged that the action was not *bona fide* or that the first respondent had the opportunity to put the second respondent into liquidation. This is not the appellant's pleaded case on the subject of derivative action. We are not persuaded, in view of the circumstances peculiar to this case, that this is a sufficient ground to support a conclusion that the first respondent could not pursue its claim by way of derivative action.

[46] The reasoning of *Ferguson v. Walbridge, supra* was applied in *Fargro Ltd. v. Godfroy* [1986] BCLC 370, [1986] 1 WLR 1134. At p. 251 of *Barett v. Duckett, supra*, the following passage appears:

> That reasoning was applied by Walton J in *Fargro Ltd. v. God Froy*. In that case a minority shareholder in a company which was deadlocked wished to bring a derivative action, alleging that the other shareholder and directors had diverted assets and opportunities belonging to the company to their own use. Before the writ was issued the company went into liquidation. When the Plaintiff issued the writ, the Defendants applied to strike out. The application succeeded.

[47] In the present action, the second respondent, before the action was filed, was a going concern and there was no issue of it being in liquidation unlike Travel in *Barrett v. Duckett, supra* where there were attempts to put it into liquidation and that it was only after "Christopher's attempts to put Travel into liquidation that Barrett belatedly commenced this action (see p. 253 of *Barrett v. Duckett*). Thus the court in *Barrett v. Duckett, supra* took into consideration the unusual circumstances of the case, the opportunity that Travel be put into liquidation which was offered and continued to be offered by Christopher could be said to provide an alternative remedy such as "makes the derivative action inappropriate". There is therefore the actual obvious difference between the present case and *Barrett v. Duckett, supra* as such the case is of little assistance to the appellant and would not convince us to rule that derivative action in this suit is wholly inappropriate. Derivative action is a procedural convenience for enabling the court to do justice and for the benefit of a company which is controlled by miscreant director and shareholder and persons associated to them. A winding up action, on the other hand, provides a separate remedy to a shareholder to seek redress for his grievance and for his benefit. We wish to emphasise that the court should not shut its door to any person who comes forward to start the proceedings for the benefit of a company and not for some other purpose (*Nurcombe v. Nurcombe, supra*).

Conclusion

[48] Based on the foregoing reasons and discussions, it would be inequitable if we were to decline jurisdiction on the ground that this action is not a derivative action. There is overwhelming evidence that would show that, despite the appellant and the first respondent being in equal shareholding position with equal voting power scenario, the appellant is in *de facto* control of the second respondent that would in effect not have been possible for the first respondent to set the second respondent in motion to bring the action. The action is not wrongly constituted. We are satisfied that the first respondent is correct in pursuing its claim against the appellant by

way of derivative action and we would have no hesitation to countenance such course of action. The court in this regard clearly has jurisdiction to hear the action. This is a fit and proper case for the appeal to be heard fully on the merits. It is therefore our unanimous decision that the appeal on this issue of derivative action should be dismissed with costs and we order accordingly.

[49] We are now ready to hear the appeal on the merits.